
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
)
) **DEFENSE NOTICE OF**
) **MOTION TO DISMISS**

)
) **(FOR FAILURE TO STATE**
) **AN OFFENSE WITHIN**
) **THE SUBJECT-MATTER**
) **JURISDICTION OF A**
) **MILITARY COMMISSION**
) **AND CONTRARY TO THE**
) **RECOGNIZED LAWS OF**
) **WAR)**

)
)
) 19 August 2004

The Defense in the case of the *Salim Ahmed Hamdan* provides the following notice of motion:

1. This Notice is filed in accordance with the Presiding Officer's Order made via Email on 31 July 2004.
2. Relief Requested: The Defense seeks dismissal of charges based on failure to state an offense triable by Military Commission.
3. Synopsis of Legal Theory: The jurisdiction of military commissions is strictly limited to (1) violations of the laws of war, or (2) other crimes occurring during or in the immediate aftermath of a declared war while United States forces occupy, and hence must adequately police, territory captured from the enemy. As a plurality of the Supreme Court held in *Reid v. Covert*, 354 U.S. 1, 21 (1957),

[t]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish. . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

The acts charged to have been committed by Mr. Hamdan are not delivery of weapons, obtaining supplies, serving as a driver, training on rifles and handguns are not violations of the law of war. Nor are these other criminal actions that occurred during a war or in the immediate after-math as they did not occur during or in a theater of combat operations and as such constitute at best pre-war conduct. Finally, Conspiracy as a theory

of liability for a minor participant that did not have command authority or specific knowledge of plans or participate directly in operations has been specifically rejected by the law of war.

4. Witnesses and Evidence: The Defense intends to enter evidence and call facts witnesses concerning Mr. Hamdan's pre-commissions confinement and the impact of the government's delay on Mr. Hamdan. Additionally in the event that abeyance of hearing this motion below is not granted, the Defense intends to call expert witnesses concerning the applicability of the Uniform Code of Military Justice to Commission proceedings in support of this motion.

5. Oral Argument: Because the full facts will not be known until such time as a conclusion of evidentiary hearing, the Defense requests oral argument for this motion.

6. Request for an Extension of Time: The Defense moves to incorporate the decisions of the Federal Court into this tribunal process and to hold hearing of this motion in abeyance pending the resolution of the application of whether the Military Commission has jurisdiction to hear the crime alleged. Detailed Defense Counsel has already challenged in federal court on Mr. Hamdan's behalf as "next friend," the right of the government to hold Mr. Hamdan in pre-commission confinement on the grounds that Mr. Hamdan's conduct is not triable by Military Commission. In order for the Federal Court to resolve the merits of Detailed Defense Counsel's petition, the Federal Court must determine whether the charges alleged are within the jurisdiction of a Military Commission. Detailed Defense Counsel anticipates resolution of this issue prior to its proposed date for commencement of the Commission to hear evidence on the merits of the case. Accordingly, the Defense moves to incorporate the decisions of the Federal Courts into this tribunal process and to hold hearing of this motion in abeyance pending the resolution of the lawfulness of these proceedings in Federal Court.

The proper course for this Commission to proceed is to allow for the Federal Court to decide these matters and for the Commission to follow the Federal Court's guidance. As stated by Attorney General Biddle in the Nazi Saboteur case; in his response to the defense's claim that "the order of the President creating this court is invalid and unconstitutional," Biddle said in part that:

In the first place, I cannot conceive that a military commission composed of high officers of the Army, under a commission signed by the Commander-in-Chief, would listen to argument on the question of its power under that authority to try these defendants.

In the second place, let me say that the question of the law involved is a question; of course, to be determined by the civil courts should it be presented to the civil courts.

Thirdly, this is not a trial of offenses of law of the civil courts but is a trial of the offense of the law of war, which is not cognizable to the civil courts. It is the trial, as alleged in the charges, of certain enemies who crossed our borders,

crossed our boundaries, which had then been described by the military and naval authorities, and who crossed in disguise in enemy vessels and landed here. They are exactly and precisely in the same position as armed forces invading this country. I cannot think it conceivable that any commission would listen to an argument that armed forces entering this country should not be met by the resistance of the Army itself under the Commander-in-Chief or that they have any civil rights that you can listen to in this proceeding.

Transcript available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi01.htm ("Saboteur Tr.") (emphasis added). See also Rehnquist, *All The Laws But One* 137 (1998); *Saboteur Tr.*, at 2765 (adjourning commission for a number of days so that defendants could proceed in Supreme Court); *id.*, at 2935 (remarks of the lead prosecutor, the Judge Advocate General defending commission's jurisdiction: "the defense counsel have attempted to show that Long Island and Florida were not in the theater of operations. I will admit that that contention was made before the decision of the Supreme Court yesterday on the habeas corpus matter. It seems to me that that probably will straighten out the question as to whether this is a theater of operation."); *id.*, at 2963 (remarks of Judge Advocate General, "I do not see how counsel can plead surprise when counsel was arguing that very thing to the Supreme Court)

In the present case the question of whether the charges state an offense within the jurisdiction of this Commission are now before a civil court and as conceded by the government in its statements and practice with respect to the Nazi saboteurs, the Federal District Court's finding of law will be determinative on this Commission and judicial economy dictates that this motion be held in abeyance pending the civil court's resolution.